

But no arbitration requirement was included in the statute, and the Commission should resist the invitation to impose it now. Mandatory arbitration would dramatically skew the entire negotiating process. Individual parties may, of course, decide together to resort to mandatory arbitration, but the Commission should not unilaterally and uniformly impose that requirement.

J. Retransmission Consent Agreements Should Be  
Formal And Subject To Judicial Review

CR&B supports the suggestion in the NPRM that retransmission agreements be reduced to writing. That simple requirement will go a long way towards minimizing future misunderstandings. The written agreements should include a statement to the effect that the broadcaster is conveying "retransmission consent, pursuant to 47 U.S.C. 325." But other than that "magic" language, the parties should be free to draft an agreement to their own liking. When interpretive disputes do arise, they should be handled as conventional contract matters to be resolved by the courts, rather than the FCC.

Because there may continue to be legal uncertainty regarding the operation of retransmission consent for some time, many broadcasters may wish to qualify their grant with various assorted disclaimers. Some may feel compelled, for example, to note that retransmission consent is being made "only to the extent lawful." As part of its effort to quickly implement a workable retransmission consent scheme, the Commission should

make clear that, at least for the initial three-year term, this sort of qualified grant is perfectly acceptable, and a cable operator need secure nothing more. Moreover, the Commission should immunize cable operators from any liability arising from a good faith reliance on a purported grant of retransmission consent.

K. Stations Electing Retransmission  
Consent Cannot Interfere With  
The Rights Of Must Carry Stations

The NPRM asks how the Commission should address the potential for conflicts between stations electing retransmission consent rights and must carry. It notes, in particular, the language of Section 325(b) and the Conference Report which appear to give "must carry" stations priority with regard to channel positioning. The matter is really just a subset of the channel positioning issue discussed above. The fact that "retransmission consent" stations may also make channel positioning requests is no reason to stray from the recommended approach giving cable operators the sole authority to independently resolve conflicting demands. For purposes of channel positioning, stations invoking retransmission consent are no different than any other non-must carry programmer. Their requests can be considered only after the requests of must carry stations have been addressed.

L. A Broadcaster's Election Decision  
Must Be Binding

The NPRM raises the possibility that stations sometimes be allowed an interim change in their election decision between must carry and retransmission consent. The NPRM specifically considers a situation similar, but not identical, to one raised in the Senate Report. It concerns a station that initially elects must carry, and is carried on the cable system, but not pursuant to that request (presumably because the system's must carry quota is already full).

As a general rule, interim election changes should be prohibited; they can only add confusion to an already confusing situation. In this case, the fact that a system voluntarily carries a station that was initially willing to be carried pursuant to a non-compensatory must carry arrangement is hardly cause to extend the station the right to reverse its initial election and suddenly seek compensation for carriage. The cable operator would then need to reevaluate whether it wants to continue carriage of that station and whether it should change its list of stations officially carried pursuant to must carry. A vicious cycle would quickly begin that might be difficult to break. Worse still, there is no off-setting policy justification for allowing the election change in the first place.<sup>51/</sup> Given the

---

<sup>51/</sup> The Commission's discussion in the NPRM seems premised on an unspoken fear that a failure to provide broadcasters with

plain language of the statute, the Commission should ignore any contrary suggestion in the Senate Report and require each station to stick to its initial election decision until the three year term expires.<sup>52/</sup>

M. A Merger Of Two Formerly Separate  
Cable Systems Or A Change In Market  
Designation May Sometimes Justify  
Extending A Broadcaster The Right  
To Make A New Election Decision

CR&B has identified just two situations where enforcing a broadcaster's initial decision would be sufficiently awkward to justify a new election. The first situation involves a change in a system's technical integration. As already explained, a broadcaster should be required to make a single election with regard to each technically integrated cable system. When two separate systems, one subject to must carry and the other subject to retransmission consent, become technically integrated, that mandate is immediately violated. In most instances, there will be no adverse consequences from the integration, and no change in election should be permitted. However, if the cable operator

---

[Footnote Continued]

election flexibility will somehow allow cable operators to manipulate the statutory scheme. The concern is more imagined than real.

<sup>52/</sup> Of course, if a station elects must carry to no avail (because the station's quota is already full), the prohibition on carriage payments should not apply. The disappointed broadcaster should be allowed to compensate the cable operator for carriage.

faces a must carry obligation in part of the system and previously had been unable to reach a retransmission consent agreement for the rest of the system, the operator should have the right to insist the broadcaster make a uniform election.

The second situation involves a change in a system's market designation. If the change puts a system in a broadcaster's must carry zone for the first time, the broadcaster should have the option of invoking must carry.<sup>53/</sup> An ample transition period should be provided for notification, election, negotiation, and implementation.

N. The Commission Must Restrict Retransmission  
Consent Demands That Would Lead To  
Unreasonable Basic Service Rates

The NPRM concludes with a brief discussion of the Commission's responsibility regarding retransmission consent and its effect on reasonable cable rates. The Commission largely sidesteps the issue, erroneously assuming that its responsibility is limited to ensuring that operators are able to recover retransmission costs through regulated service rates. In fact, the Commission is responsible for limiting the inflationary impact of retransmission consent. Section 325(b)(3)(A) provides:

---

<sup>53/</sup> This action would not, strictly speaking, be a change in election, because the broadcaster previously did not have the option of making the election.

The Commission shall consider in [this] proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligations.

If Congress' goal was simply to protect the operator's recovery of retransmission costs, this provision, and its inclusion in Section 6 of the 1992 Cable Act, would be entirely unnecessary. Section 3 (which addresses cable regulation) already instructs the Commission to take into account the "direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier."

47 U.S.C. § 623(b)(2)(c)(ii). The fact is the reference to basic service rates in Section 6 was added to allay fears, much publicized in the final days of the legislative session, that retransmission consent would be inflationary.<sup>54/</sup>

Although CR&B is not prepared to advance a formula to quantify the maximum "reasonable" compensation for retransmission consent, it does have two suggestions to minimize both the likelihood of such requests arising and the severity of any negative ramifications.

---

<sup>54/</sup> See, e.g., 138 Cong. Rec. S14,604 (1992) (Statement of Sen. Helms).

First, the Commission should recognize cable operators' right to itemize retransmission consent costs on subscriber bills. The regulation should provide:

No cable system shall enter into any contract, arrangement, or understanding, either express or implied, preventing or hampering it from publicly disclosing any retransmission consent costs (including, if readily verifiable, the market value of any barter arrangement). Such public disclosure may include, but shall not be limited to, itemization of such costs on subscriber bills.

Second, cable operators should have the ability to petition the Commission for special relief in cases where they believe a broadcaster's compensation request would (if agreed to) have a material adverse impact on basic subscriber rates. During the period the petition is pending at the Commission, operators should be entitled to continue carrying the station at issue without any retransmission consent liability. CR&B suggests that the only exception to this approach would be in cases where the Commission concludes the operator's petition was frivolous or pursued in bad faith. In those situations, whatever compensation the Commission ultimately allowed would be applied retroactively to the date of the operator's complaint.

O. Commission Regulations Should Include An  
Implementation Schedule For Must Carry  
And Retransmission Consent

As already noted, the initial implementation of must carry and retransmission consent poses the risk of significant

disruptions to signal carriage and viewing continuity. Commission regulation should be fashioned to minimize the transition burden on all of the parties involved, including cable subscribers. This can best be accomplished by adopting a coordinated schedule, so that any necessary carriage changes can be made at a single point in time. The ability to make these changes all at once will facilitate orderly planning and reduce the level of subscriber confusion.

The Commission should require television stations to elect between must carry and retransmission consent well before either goes into effect.<sup>55/</sup> To minimize disruption, the implementation for both must carry and retransmission consent should be set at October 5, 1993.<sup>56/</sup> The implementing regulations must, of course, provide sufficient time to analyze and respond to various issues. It must also give the cable operator ample time to implement necessary changes and notification prior to October 5. Given the tight time schedule, the regulations should also

---

<sup>55/</sup> The Act also gives the Commission the right to adopt regulations that require the election to be made within one year of enactment. The Commission has full authority, in the interests of administrative harmony, convenience and necessity, to require that the election be made earlier than the expiration of the one-year period.

<sup>56/</sup> The Commission's obligation to adopt must carry regulations by April 3 does not mean that the regulations must, or can, go into effect at that date. A six month transition period is both reasonable and appropriate to accommodate the changes implementation of the rules will help bring about.



include incentives and penalties to encourage adherence to the specified schedule.

CR&B suggests the following schedule:<sup>57/</sup>

Monday, May 3: Commercial and noncommercial stations electing must carry status must provide written notification to cable operators. The initial must carry notice should specify the particular systems involved. It should also include full documentation as to must carry eligibility and any requests regarding channel positioning. If no notice is received, cable operators should assume the station has elected retransmission consent.

Monday, May 24: Cable operators must notify "must carry" stations of any relevant carriage issues, including signal quality, copyright, and substantial duplication. Cable operators must notify "retransmission consent" stations of their interest in securing retransmission consent.

---

<sup>57/</sup> This schedule gives each party several weeks to respond at each step. The Commission should supplement the schedule with instructions to both broadcasters and cable operators to cooperate in interim exchanges of information that will fairly allow each party to honor its obligations under the schedule. For example, if a broadcaster is unable to determine whether a particular system lies inside or outside its ADI, the cable operator should provide this information in time for the broadcaster to determine whether it can invoke must carry by the May 3 deadline.

Monday, June 14: Stations must respond to operator notices. If a "must carry" station does not respond, an operator can assume that the station is unable or unwilling to meet the obligations necessary to secure must carry status. Must carry rights are forfeited for a one-year term. If a "retransmission consent" station does not respond, an operator can assume that retransmission consent is granted for a one-year term.

Monday, July 5: Operators must provide stations with a decision regarding must carry status, as well as a tentative channel assignment.

Monday, July 26: Channel positioning discussions must be concluded, and stations notified of their official channel position.

Monday, August 2: If retransmission consent agreement is not reached by this date for a signal already being carried on the system, the operator is: (1) excused from any and all subscriber notification requirements otherwise applicable to the signals at issue;<sup>58/</sup> and (2) excused from any and all understandings to keep a broadcaster's current compensation demand confidential.<sup>59/</sup>

---

<sup>58/</sup> Without this relief, the notification requirements could be unfairly exploited by broadcasters.

<sup>59/</sup> This is not meant to imply that every cable operator will necessarily be obligated to keep earlier negotiations confi-

Monday, October 5: Must carry and retransmission consent go into effect.

The "default" provisions included in the above schedule are suggested as a means to discourage delay. This scheme (or any other scheme the Commission might choose to implement) should encourage prompt, realistic negotiations, while still protecting the interests of cable subscribers.

Once the burden of initial implementation is complete, the schedule for must carry/retransmission consent need not be quite so rigid. The Commission should make clear, however, that it expects the parties to pursue such matters in good faith and to allow cable operators a reasonable opportunity to both implement necessary changes and notify subscribers.

---

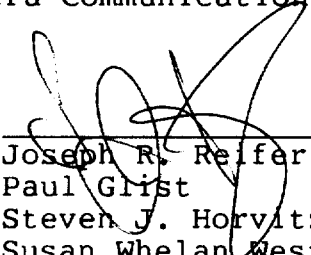
[Footnote Continued]

dential, nor does it require every operator to "go public" at this date. It is simply a prophylactic measure to encourage broadcasters to make reasonable demands by this date.

Respectfully submitted,

Acton Corp.  
Allen's Television Cable  
Service, Inc.  
Cable Television Association  
of Maryland, Delaware and  
District of Columbia  
Columbia International, Inc.  
Frederick Cablevision, Inc.  
Gilmer Cable Television  
Company, Inc.  
Greater Media, Inc.  
Helicon Corp.  
Jones Intercable, Inc.  
KBLCOM Inc.  
Monmouth Cablevision Assoc.  
MultiVision Cable TV Corp.  
OCB Cablevision, Inc.  
Rock Associates  
TeleCable Corporation  
Texas Cable TV Association  
West Virginia Cable Television  
Association  
Zylstra Communications Corporation

By



\_\_\_\_\_  
Joseph R. Reifer  
Paul Glist  
Steven J. Horvitz  
Susan Whelan Westfall  
**COLE, RAYWID & BRAVERMAN**  
1919 Pennsylvania Ave., NW  
Suite 200  
Washington, D.C. 20006

(202) 659-9750

January 4, 1993